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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JENNIFER ECKHART, et al.,

Plaintiffs,

v. 20 CV 5593 (RA)

FOX NEWS NETWORK, LLC, et al.,

Defendants.

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New York, N.Y.
July 21, 2021
2:00 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

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DOUGLAS CHALKE

(Case called)

MR. WILLEMIN: Good afternoon, your Honor. Michael Willemin, with Wigdor LLP, for the plaintiff, as well as, I suppose, for Wigdor LLP.

THE COURT: Good afternoon.

MR. VARGHESE: Good afternoon, your Honor. Renan Varghese, from Wigdor LLP, for the plaintiff.

THE COURT: Good afternoon.

MS. McKENNA: Good afternoon, your Honor. Kathleen McKenna, Proskauer Rose, for Fox News Network, together with my colleague...

MR. GROSSMAN-BODER: Good afternoon. Yonaton Grossman-Boder, also from Proskauer Rose, for Defendant Fox News.

THE COURT: Good afternoon.

MS. FOTI: Good afternoon, your Honor. Catherine Foti, from Morvillo Abramowitz Grand Iason & Anello, for the defendant, Ed Henry, with my colleague...

MR. CHALKE: Douglas Chalke.

THE COURT: Good afternoon, everyone.

Why don't we jump right in. Who would like to be heard first on their motion to dismiss, Fox or Mr. Henry?

Mr. Henry, why don't we start with Fox, then.

MS. McKENNA: May I stay seated?

THE COURT: You may, you may. I'm just going to ask

everyone to speak into the microphones.

MS. McKENNA: Will do.

Your Honor, Fox News Network respectfully suggests that Ms. Eckhart's claims, all of them, are subject to dismissal as a matter of law. I'd like to begin, if I might, with the claim that purportedly gives her federal jurisdiction, which is her sex trafficking claim. As your Honor knows from our briefing, we believe Ms. Eckhart cannot make out a claim, either a direct claim of sex trafficking under the act, nor can she make out a claim, a beneficial claim, for sex trafficking.

She cannot make out a direct claim of sex trafficking because Fox News didn't commit sex trafficking. It requires --

THE COURT: Is plaintiff even making a direct claim anymore, or is plaintiff only making a beneficiary claim at this point? I thought just beneficiary. Is that right?

MR. WILLEMIN: That's correct, your Honor.

MS. McKENNA: I'll move on, your Honor.

THE COURT: Thank you.

MS. McKENNA: With respect to beneficiary claim, that also fails because she has failed to note that there is any knowledge on the part of Fox News that there would be the use of fraud, force, or coercion into a commercial sex act.

What plaintiff alleges is that allegedly Fox News should have known of some nefarious conduct on the part of Mr. Henry, but that is not enough to show knowledge of engaging

in sex trafficking. In her --

THE COURT: Why should Fox not have known that Mr. Henry was essentially exchanging empty promises for sex, having sex with individuals with the promise that he could help them in some way, even if it was just to get them in the room with some important people?

MS. McKENNA: Yes, a mere promise to extend a benefit is not sufficient to state a claim under the sex trafficking act. There has to be a reason to believe that there was fraud, that there was coercion, that there was some kind of seriously illegal activity going on. In fact, the cases, your Honor, that find sex trafficking, including those that don't, are very illustrative of this point because the cases are clear that knowledge of sufficiently more egregious conduct than it is alleged here were insufficient as a matter of law. In fact, even knowledge of prostitution has been found to be insufficient to state a claim of beneficial sex trafficking.

In addition to the fact that the complaint does not allege knowledge or any reason that Fox News should have known that Mr. Henry had coerced or would coerce anyone into sex trafficking. In fact, Ms. Eckhart herself says she couldn't have imagined the rape that she says happened in February of 2016. And she admits that once she reported the rape, Fox immediately investigated that claim, and Mr. Henry was thereafter fired. So not only has she not alleged that

Mr. Henry coerced anyone into a sex act, let alone a commercial sex act, let alone that anyone at Fox ought to have been aware of it, there's nothing about the allegations that she alleges that shows that Fox News could have or should have known that Mr. Henry would commit a sex trafficking offense.

THE COURT: Let me just stop you there. Suppose I accept as true that plaintiff's allegation in paragraph 4 of the complaint, that Fox News was on notice that Henry engaged in sexual misconduct at work and that it was an open secret, which is in quotes here, at Fox News that Henry was a serial harasser, he used his power to prey on younger female employees, why is that not enough to make it plausible that Fox News should have known that he was engaging in this kind of conduct, that he was engaging in, at the very least, again, exchanging empty promises for sex?

MS. McKENNA: So, if empty promises for sex were sufficient, your Honor, every sexual harassment case, every quid pro quo case, would constitute a violation of the sex trafficking act. That is not what the cases hold.

Additionally, I would note — and we'll get to this, I'm sure, when we talk about whether substantively her claims of harassment are sufficient for purposes of Title 7 and state law — in point of fact, she does not allege behavior that would have put Fox News on notice that he was engaging in sex trafficking, which she generically says is that he was engaged

in sexual misconduct. That's not sufficient to say he engaged in workplace sexual misconduct. She says he had an affair with a Las Vegas stripper. That was nonwork behavior, whatever one thinks of it. And we know the complaint alleges that there were women in the company who complained that that affair was distressing to them — crushing, I think, was the word. It is not sufficient for sexual harassment, and it is certainly not sufficient to put Fox on notice that Mr. Henry would commit a sex trafficking offense.

THE COURT: So, with respect to the definition of commercial sex act, under the statute, it's defined as any sex act on account of which anything of value is given to or received by any person.

So, why is promising to get someone in a place with important people that could help with that person's career not something of value?

MS. McKENNA: It is not a thing of value. For purposes of sex trafficking, it has to be a significant thing of value, but, in any event, he has to have used inappropriate means to get it. A mere promise is not sufficient to constitute coercion, your Honor.

THE COURT: How is this different from the Weinstein cases in that respect?

MS. McKENNA: So, the Weinstein cases, it's different in two respects, your Honor. In the Weinstein cases, his

tremendous influence in the industry — and I'm quoting here from the *Noble* case, Weinstein case — was not enough to establish coercion for purposes of sexual behavior. And I will also note that with respect to holding a third party responsible, the case involving his brother, the court concluded, and we have not yet talked about this, your Honor, but Fox News did not benefit from the alleged sex acts here. And when there was no benefit to the alleged sex act, it does not establish sex trafficking.

THE COURT: Do you have to benefit from the sex act, or can you benefit with the venture, with the person? So, looking at 18 --

MS. McKENNA: 1595(a), your Honor?

THE COURT: Right.

So, an individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator, or whoever knowingly benefits financially or by receiving anything of value from participation in a venture which that person knew, or should have known, has engaged in an act in violation of this chapter.

So why is it insufficient just to benefit from the venture?

MS. McKENNA: Yes. So, your Honor, both cases, both the *Geiss* and *Canosa* case that we cite to, make it clear that, here, the knowledge has to be knowing that you're benefiting

from sex trafficking, you need to know that the benefits flow from the sex trafficking. That's what *Geiss* holds, that's what *Canosa* holds, that the allegation that there are benefits that The Weinstein Company affirmatively -- they knew about, they enabled, and concealed his actions was sufficient to create a benefit from the sex trafficking.

In the *Geiss* case, the benefits alleged were insufficient because there, the company benefited despite his activities. So, it is clear that the company, in order to be responsible, held responsible, needs to know that they were benefiting from the sex trafficking. And in the Weinstein case, the one in which liability was found, there were factual findings that, in fact, they knew that he was engaging in this sexual behavior and that was keeping him happy and productive. We don't have those kind of allegations here at all, your Honor. What we have is allegations that assertedly we knew about sexual misconduct.

THE COURT: Is the Paul Weiss report public?

MS. McKENNA: No, your Honor.

THE COURT: All right.

You may proceed. Thank you.

MS. McKENNA: Your Honor, turning, then, to the sexual harassment claims, which are the second, fourth, and seventh cause of action, seriatim, Title 7 New York State, New York City Human Rights Law, all of those harassment claims alleged

by Ms. Eckhart are time-barred. The last sexual encounter she alleges occurred in February of 2017. This is the alleged rape in the hotel room followed by an exchange of text messages on Valentine's Day. It is not until July 2020 that she filed her complaint. Thus, her complaint was filed beyond the 300 days permitted under Title 7 and beyond the three years set forth both in the New York State and the New York City human rights acts.

THE COURT: Why can I not consider the 2018 messages to constitute a continuing violation, in particular the October 5th, 2018 one, where he says, "Why did you turn away today?" These are people working, as I understand it, in different cities, they don't see each other that often, the alleged harassment occurred over a number of different years, with long time spans in between. Why could that not be considered part of the conduct overall?

MS. McKENNA: Right. These allegations are insufficient, your Honor, to state a continuing violation allegation. Plaintiff, obviously recognizing that her claims are time-barred, is looking to find something to hook them together to the prior conduct.

Those communications are entirely nonsexual allegations, and, therefore, they're not related conduct to the rape and the sexual encounters that she alleges occurred.

THE COURT: Well, why is that comment, "Why did you

turn away today," if people are engaged in -- if there had been harassment, and it had been ongoing over a period of time, even, again, if sporadic, because they didn't see each other that often, why is a line like "Why did you turn away today" not part of that conduct, part of that harassment?

MS. McKENNA: Well, for the second reason, but I think -- I want to go back to the statement itself, but it is far too remote in time to resurrect that prior allegation, that time-barred allegation, the rape in 2017. A gap of here more than 20 months is far too remote in time to be part of a continuing violation, stretching back to conduct that was in 2014 through 2017, your Honor.

And on its face, people who have a relationship, saying "Why did you turn away" does not resurrect. It's neither related to, nor too remote in time, to resurrect a claim of sexual misconduct.

THE COURT: But this is in the context of a relationship where there are texts saying, you know, are you playing hard to get and things to that effect. I think it's the *Morgan* case that said something to the effect that no stretch of time is categorically too remote.

MS. McKENNA: Well, I think you're thinking of the *McGullam* case, your Honor, and in that case, it said, although the incident-free interview doesn't preclude relatedness, it renders less plausible the notion — in that case, there was a

sleepover comment — is of a piece with the production department conduct, which was obviously sexual behavior. And so for exactly that reason, we cite *McGullam* for that reason, that this totally nonsexual greeting kind of comment, even if it's a greeting from someone you don't want, is not sufficient to resurrect a sexual harassment claim.

I think it is more analogous to the Second Circuit's decision in *Purcell*, where the incidents are not part of the same practice when they are separated in such a long period of time, as they are here. And they are not related because they're not of a similar nature. This is hello, this isn't sexual behavior.

And the frequency and the temporal proximity are such, that it doesn't seek to go back under the law and resurrect claims that are already stale and done. Those are single incidents, they're clearly time-barred, she knows it, and she points to three completely nonsexual comments. That, as a matter of law, is insufficient to resurrect stale claims.

Your Honor, even if there was a continuing violation, which there is not, as a matter of law, the claims are insufficient.

So, first, I'd like to turn to plaintiff's claim that she has a cognizable federal claim under Title 7. She does not, as she failed to exhaust the requirements under Title 7. We know plaintiffs have to file a charge with the EEOC, and the

EEOC has to investigate and dismiss the charge or 180 days have to elapse.

Ms. Eckhart filed her EEOC charge in either July or August of 2020, 180 days would not elapse until January or February of 2021, and it is not disputed that there was no investigation and no dismissal as of the time she filed her suit. Because she did not exhaust her pre-filing requirements, she cannot pursue a Title 7 claim. So found the Court, as your Honor knows, in the *Gibb v. Tapestry* case. There are additional cases cited in the brief — the *Hardy v. Lewis* case and the *Henschke v. New York Hospital-Cornell Medical Center* case.

If your Honor has no questions about the EEOC claim, I will move forward to whether or not any of her claims, Title 7 or the state or city claims, can be imputed to Fox News.

As your Honor knows, there are only two ways you can make Fox News responsible for Mr. Henry's behavior. One is to be able to show that he was a supervisor or manager, and, failing that, because they were coworkers, she needs to be able to show that Fox News knew, or should have known, of discriminatory or harassing behavior.

She does not, and cannot, allege that Mr. Henry was a manager or supervisor, not that he managed or supervised her or anyone else at Fox News. In fact, the complaint alleges that Ms. Eckhart's supervisor was another individual, Brad Hirst.

He was her manager pursuant to paragraph 29 of the complaint. She admits she never worked with Mr. Henry. As your Honor noted before, they worked in different cities. In fact, they worked in different networks. Their first contact with each other was through a private Twitter message, not through Fox News, and she says he invited her on air. Even nonemployees, in fact, most frequently nonemployees are invited on the air. So he was not her supervisor and manager.

Nor is there a sufficient allegation that Fox News knew, or should have known, of Mr. Henry's misconduct. In fact, it is clear that Fox News did not know of Mr. Henry's misconduct until she reported it three years after it was alleged. The complaint nowhere alleges that Fox News knew of Mr. Henry's misconduct towards her. The last act of misconduct, as we have established, was in February of 2017. She did not report that misconduct until 13 days after she was fired, and when she reported it, Fox News investigated it, and Mr. Henry was terminated.

THE COURT: What am I to make of the allegation that in her exit interview, she was asked if she had been sexually harassed or assaulted at Fox News?

MS. McKENNA: That is Ms. Areu's last-ditch effort to attempt to construe that --

THE COURT: Ms. Eckhart.

MS. McKENNA: I'm sorry. Thank you, your Honor.

That Ms. Eckhart is trying to construe to a last-ditch effort that we knew, or should have known -- it is not an admission of knowledge. For purposes of *Iqbal* and *Twombly*, it has to be a reasonable conclusion. In this day and age, it is common, and certainly not an indication of knowledge of sexual harassment, let alone sexual harassment, by Mr. Henry, to ask, in an exit interview, whether you have ever been a victim of sexual harassment. In fact, to find that way would really disincentivize employers from doing that, let alone an employer like Fox News, who obviously was trying, as they did by investigating Ms. Eckhart's allegations about Mr. Henry, to take these matters seriously. So the fact that after she's been terminated, after she has complained that we ask people whether or not they've been the victim of sexual harassment, it's a pretty common exit interview question, your Honor. I don't think it shows any reason to believe that Mr. Henry, who she didn't even work with, who was in a different city, that we would have knowledge, or should have knowledge, of misbehavior by Mr. Henry.

With respect to knew or should have known, I would also note that there is no allegation of Fox being on notice of any workplace misconduct, sexual misconduct, by Mr. Henry, as I noted before, your Honor.

If you have no questions about that, I will move to the retaliation claim, your Honor, which is her third, fifth,

and eighth cause of action, again, respectively under federal, state, and city law.

It's axiomatic, your Honor, that if there is a failure to allege protected activity, one doesn't get to assert a retaliation claim. And as the complaint is clear, Ms. Eckhart did not engage in any protected activity prior to her termination, which is fatal to her claim.

At best, she engaged -- not at best, she did engage in protected activity 13 days after she was fired, when she told us of Mr. Henry's alleged rape, and it was investigated, and Mr. Henry was terminated. She did not complain of any behavior that was sexual in nature until after her termination. And she concedes as much, and, therefore, she has focused her attention into behavior that was engaged in after her termination.

The only other exception, your Honor, is she does allege earlier, in February of 2020, that she had complained to her manager, Mr. Hirst, and Ms. Collins, the Senior Vice President of Human Resources, that she was experiencing a toxic work environment at Fox News. She concedes, in her briefing, that she did not mention sexual harassment or sexual misconduct in that conversation. She now claims that Fox News should have reasonably understood that what she was complaining about was sexual harassment.

First, as a matter of law, it's not what we should have understood — we don't have to read her mind. The cases

say we look at exactly what the plaintiff has said, not what she imagines that we think she said. But, more importantly, for purposes of *Twombly* and *Iqbal*, it is clear from the context of plaintiff's complaint, that what she was complaining about that was allegedly toxic was the abuses from her female boss, and on a motion to dismiss, inferences have to be based on the facts that are alleged and have to be reasonable. What she alleges is that she was complaining about Ms. Claman, that she alleges that she was belittled and mistreated by Ms. Claman, that Mr. Hirst himself acknowledged and recognized that. Given the allegations in the complaint, it's unclear how it could have been referring to anything other than the environment created by Ms. Claman, let alone a complaint about Mr. Henry, with whom she did not work, in a different city, in a different network.

And so, for those reasons, that, and the notice in her exit interview, are insufficient to demonstrate that she engaged in protected activity prior to her termination.

She also, to try and cure that deficiency, makes allegations about alleged protected activity after her termination. First, she says an argument that is really inexplicable, that somehow firing Mr. Henry, without giving her prior notice that we were going to fire him, is retaliation. How, after someone has been terminated, that they learn that their harasser has been terminated, would discourage someone

from engaging in protected activity is a mystery, your Honor. There's no rationale for this argument, and she doesn't even claim that anything about the announcement of Mr. Henry's termination somehow was mentioned to her or was discouraging to her.

She next says that the fact that Fox has filed a Rule 11 motion constitutes retaliation.

First of all, she -- as we note in our papers, your Honor, she cites no case to support this point, and I think the case law that is there demonstrates that that cannot be a cognizable claim. The threat of a sanctions motion couldn't reasonably deter a person from filing a suit. In any event, she had already filed here and amended. And the Rule 11 motion is expressly authorized by the Federal Rules, and we have to read federal legislation in harmony.

Lastly, she says that Mr. Henry's motion to dismiss, which included intimate photographs, is somehow retaliation by Fox News. She does not allege any facts to substantiate her false allegation that somehow Fox News had something to do with Mr. Henry's motion. She identifies no case holding that an improper responsive pleading could constitute unlawful retaliation, and she doesn't allege that Fox News did or said anything to endorse Mr. Henry's filing. And last, but not least, your Honor, that Rule 11 filing is not as to Ms. Eckhart; that motion was filed when the cases were joined,

and days later, as your Honor knows, you severed those cases. Those cases seek sanctions against Ms. Areu, against the Wigdor firm as counsel for Ms. Areu, and against her current counsel, but they have nothing to do with Ms. Eckhart and, therefore, cannot be the basis of filing a retaliation claim.

Last, but not least, I feel an obligation to defend my honor here a little bit, your Honor. Ms. Eckhart is wrong, as a matter of law, to say that her retaliation claim is supported by Fox News' choice of hiring current counsel.

THE COURT: I'll tell you, I find that argument offensive.

MS. McKENNA: Thank you, your Honor.

Last, but not least, the remaining claim as to Fox News involves the eleventh cause of action, which alleges that Fox can be responsible for the dissemination or publication of intimate images. Fox News had nothing to do with the filing of the images in Mr. Henry's motion to dismiss, nor does Ms. Eckhart allege any facts that plausibly suggest otherwise.

The claim also fails as a matter of law. The New York State statute provides a cause of action only against an individual who disseminated or published the photograph. She doesn't allege that Fox News disseminated or published anything. It's obvious that Mr. Henry did. So if there is to be any liability, it runs solely to Mr. Henry.

In any event, we don't believe that the New York law

here applies to the filing here in federal court because the statute, on its face, says that it doesn't apply to legal proceedings. Filings made in legal proceedings and the images here were obviously related to the claims and defenses in the lawsuit, and, therefore, the statute doesn't apply to filings made in a legal proceeding.

That disposes of all the causes of action that are alleged against Fox News. I'm happy to answer any other questions your Honor might have.

THE COURT: Thank you.

Ms. Foti, why don't I hear from you with respect to Mr. Henry.

MS. FOTI: Yes, of course, your Honor.

So just an initial statement: About the paragraph 4, in which you -- it references that is a well-known secret somehow at Fox that Mr. Henry's a serial harasser, that's just a blatant conclusory statement without any supporting facts. There's nothing that supports the fact that there was any serial harassment that Mr. Henry engaged in at Fox News. The only thing that's being alleged here, which we can actually concede, is that he had a relationship with this woman, Ms. Eckhart. There is nothing else that would support that statement, and, indeed --

THE COURT: There are a lot of other statements in the complaint about other people saying, you know, watch out for

him -- I don't want to misquote anything, so I'll turn to that section of the complaint, but there's paragraph --

MS. FOTI: Your Honor --

THE COURT: -- 114, 115, 116 --

MS. FOTI: But, your Honor, I'm talking about harassment. We're talking specifically about sexual harassment in the workplace. Almost all of those statements have to do with people who are people that, if, in fact, they're even true, Mr. Henry approached outside the workplace have nothing to do with his workplace.

THE COURT: What does it mean to watch out for someone? I hear your point about workplace versus not, and I will look more closely at those.

MS. FOTI: I don't know what it means to watch out for someone, but the fact of the matter is, if, in fact, Mr. Henry chooses to make an approach to someone, to try to date someone, have some relationship with someone, it does not support sexual harassment in claims in this case, and he being a serial sexual harasser at Fox, it does not support those allegations.

So, the allegation is --

THE COURT: Sorry, I don't mean to cut you off, but what it says in paragraph 111 -- I understand that the Paul Weiss report is not public, but in paragraph 111, it says, "Indeed, starting mid-2016, Fox News, through the law firm of Paul Weiss," et cetera, "conducted a series of companywide

investigations into issues of sexual harassment. During the investigations, multiple women came forward to complain that Mr. Henry had engaged in sexually inappropriate conduct towards them," and then it goes on from there.

MS. FOTI: And Fox News has denied any knowledge of any type of allegations that Mr. Henry engaged in any type of harassment prior to this.

I don't know what's in the Paul Weiss report — it's obviously confidential — but they've denied knowledge of that. So a blatant allegation that is not supported by facts, I don't think it's something that this Court can rely on.

But turning now to the sex trafficking statute: I think what's very significant that we're missing in the analysis is the concept of the enticement. First of all, there was no basis under any of the elements, and I would like to go through all of them, but specifically in connection with enticement, the allegation that you've referenced a number of times, that he'd get her in a room with important people, happened after the first sexual encounter, the consensual sexual encounter. They agreed that Ms. Eckhart and Mr. Henry engaged in a consensual sexual encounter to begin with, and that statement happened at the end. It may even have been right then after they finished the sexual encounter, that that statement was made.

THE COURT: Well, what about paragraph 65, where I

think it's -- you'll correct me if I am wrong, but I think this is before the alleged rape, where Mr. Henry asks Ms. Eckhart over drinks if she had an agent, offered to introduce her to his agent, and told her he would bring Ms. Eckhart on his future new show at Fox News as a frequent on-air guest?

MS. FOTI: That is after they started their relationship. I think the Court is treading in very dangerous waters to say that once someone is involved in a sexual relationship with someone else, and someone offers them something to help them or offers them advice, that somehow that turns that relationship into sex trafficking if, in fact, that advice could arguably be something of value. I think that's where we would be going with that type of argument. This relationship had started. There was no attempt prior to the start of the relationship to offer Ms. Eckhart anything of value. There was nothing given to entice her to engage in a sexual encounter with her. They had sex, they had a relationship, the relationship continued.

I don't think you can take it apart piece by piece and analyze it and say, all of a sudden, we have -- which is at first an encounter that is completely consensual, all of a sudden, somehow it turns into sex trafficking because in connection with their relationship, they start talking about supporting each other in some way. I think that is a really dangerous road.

I will deal directly with those comments, though, your Honor. To the extent the Court disagrees with us, those comments themselves do not support enticement. Specifically, I think if you look at the *Noble* case --

THE COURT: Just to go back, does she allege that any of the interactions were consensual? Does she acknowledge that the first two or either of them were consensual?

MS. FOTI: In her first complaint, she acknowledged that the first interaction was consensual. She then now has changed the allegation slightly to suggest that she felt somewhat coerced to engage in that first interaction, but she has a judicial admission in the first complaint that that was a consensual --

THE COURT: Do you know what paragraph that is offhand?

MS. FOTI: I don't know if I have the --

THE COURT: No worries. Why don't you proceed. Thank you.

MS. FOTI: Going back to paragraph 65, to the extent you want to parse the sexual interactions, the paragraph 65 specifically says, according to Ms. Eckhart, that Mr. Henry said he was going to be rewarded with his very own show, and that, at some point, he possibly would get her to appear on this new show. First of all, I think the fact that the allegation is vague, not specific, there was no certainty that

he would actually ever actually get a show, there's no certainty that he could ever actually get her on his show. Certainly at this point in time in their relationship, they work at different places, he's not a supervisor, he doesn't have the show. He actually never gets such a show.

Ms. Eckhart, of all people, would know the likelihood that someone actually might get a show at Fox somewhere down the road, and that, at some point, she might be able to get on such a show.

THE COURT: But maybe he's defrauding her about it, right?

MS. FOTI: I'm sorry?

THE COURT: Maybe he's defrauding her, maybe he's lying, maybe he's bluffing, maybe he's puffing. I mean --

MS. FOTI: Your Honor, maybe he's puffing, but that is not sufficient under the sex trafficking statute.

Statements made incidental to sex, and made for reasons other than to bring about the act, are not enough. So, there has to be something specific, something material, that is offered to them. That's why in the Weinstein cases, there are very specific allegations about the fact that Harvey Weinstein meets with these women a number of times before he actually gets them into the hotel room, and in most of the occasions under those cases, the *Noble* case and in the *David* case, he meets with them, promises them some sort of position in film,

some sort of acting role, promises to introduce them to a producer. Actually, in the *David* case that you decided, your Honor, told the plaintiff in that case that, in fact, suggested she had the film role, and did that over and over and over again with multiple women. There was no allegation of that type of material, promise, or alleged fraud that Mr. Henry has committed in this case.

THE COURT: He's allegedly telling her in paragraph 65, which I believe is the same day as the alleged rape, that he's going to bring her on this new show as a frequent on-air guest. Why is that not something of value to her?

MS. FOTI: Because, your Honor, the fact of the matter is, it has to be material. This is a promise for something in the future. There's no likelihood that this is actually going to occur. And, again, they've already started a relationship, so it's a completely different context than what we're talking about in terms of enticement. There's no actual need to actually entice her. He's already in a relationship with her.

And, again, as I said, the likelihood of Ms. Eckhart actually believing that this is the case is less likely than almost any of the other examples in the cases dealing with Weinstein because Ms. Eckhart knows that the likelihood of this happening is very, very low. And she knows that she is not a political consultant. He's a political anchor. That's what he talks about. She doesn't talk about politics. That's not what

she does. Why would she actually believe that she, in fact, would be on a political show?

THE COURT: Why is it not plausible, just to one of your points a moment ago, that if you've had two sexual encounters with someone, you're essentially saying it's no longer plausible that you could entice them to have sex for something of value? Right? Is that your point?

MS. FOTI: Now you're saying that the sex trafficking act would apply to one sexual encounter, where there is no pattern. There has to be a pattern. So if I move on to the other requirements, even to the extent you say that that's enough to say enticement, there has to be, first of all, knowing force -- knowing that a force would be used or fraud. I don't agree there are any allegations of fraud. I think the promise here --

THE COURT: Well, is it fraud if it's a lie? If he's lying about his new show and bringing her on the air, why is that not fraud?

MS. FOTI: I'm not saying he's lying about that. I'm saying that it is something in the future that is not -- it's not like I have a new show in hand, and I'm going to put you on this show. It's like he says we're -- he's in discussions, that Fox might be giving him his own very show. It never actually happens. That's what I'm saying. I'm not saying that he's lying about anything.

And that is taking these facts, obviously, as true, which we don't agree with.

THE COURT: Where are you getting -- you said that there needs to be a pattern. What are you relying on for that requirement that there be a pattern?

MS. FOTI: For the knowledge requirement, your Honor. So, in terms of the sex trafficking act, the cases that have developed have said there has to be a knowing use of force or fraud, an expectation that this is going to happen. And that has been demonstrated through modus operandi in all these cases, and that's the pattern I'm talking about, that the cases have looked at and seen men engaging or -- I'm sorry, perpetrators engaging in this type of conduct previously, over and over, and that MO is what establishes the knowledge element, of the knowledge of force or fraud would be, in fact, used. There was no allegation in this complaint that that occurred. There's no pattern alleged in connection with Mr. Henry.

Again, the fact that they put in all these various women — they've gone out, they've scoured the country, apparently, to find people that he might have asked out on a date — and suggest that somehow that establishes a pattern for sex trafficking, first of all, it does not, and the conduct that they're alleging does not have to do with force or fraud. The conduct they're alleging is he happened to talk to a woman,

he sent her some sexually explicit texts at some point, maybe suggested to try to have a relationship with her, and she said no, that was done. That was Brooke Hammerling. Then they suggested another woman, Roxie Marroquin, that he had a bubble bath with her. No suggestion of force in that at all. And he ends up having an encounter with somebody where he has a bubble bath with her and doesn't even have a suggestion of sex in that, and that somehow establishes a pattern? It doesn't establish a pattern in any way. It's completely different from the previous encounter with Ms. Amerlin. It's completely different from the encounters they're talking about having to do with Ms. Eckhart.

Then they talk about these various Jane Does. What's particularly egregious, your Honor, and we'll get to it as well in the context of our motion for sanctions and to strike, is the fact that they include an allegation by a Jane Doe 1 that the Jane Joe 1 says is not truthful. They've included it in there about a relationship they've said which was not consensual. Jane Doe said absolutely not, that is not what I said. They talk about something having to do with a physical slap across the face. Jane Doe 1 apparently told Ms. Eckhart that anything that happened between her and Mr. Henry was completely consensual. Notwithstanding the fact that it included that in the complaint, we've suggested that that needs to come out of the complaint because she has clearly disavowed

it. They've left it in the complaint, but that cannot establish a pattern, it's been disavowed, and it says -- and the person who's being described in that allegation has said she was engaged in some sort of consensual relationship with Mr. Henry. That can't be the basis of a sex trafficking allegation.

The other elements, your Honor, in particular, would have to be the commercial nature of the sex act. Again, something of value. And I think we've already touched on the fact that we don't agree that the promises of some sort of future potential connection with either people in the room who could help her, speaking to an agent, that that, in fact, is anything of value. What we're relying on in those situations are other people who would have to actually do something for her, not Mr. Henry saying I'm going to give you a film role, as Mr. Weinstein did, I'm going to use my company to make you a star, none of that. It's like I might introduce you to this person I know who then might be able to help you. So, again, not material under the sex trafficking statute.

Unless you have any other questions on that, I'll move on.

THE COURT: No, thank you.

MS. FOTI: Thank you.

Just to touch again, and Ms. McKenna obviously did a very capable job on the statute of limitations, but I would

just like to comment again on the issue about the continuing violation also is problematic. The Second Circuit has very clearly said that the "Continuing violation doctrine is heavily disfavored, and courts have been loathe" -- I was reading a quote: "Continuing violation doctrine is heavily disfavored," it goes on "in the Second Circuit, and courts have been loathe to apply it absent a showing of compelling circumstances."

So, your Honor, the fact of the matter is, the three incidents they talk about certainly should not be considered to be -- to extend the statute of limitations, because if you extend the statute of limitations on those types of incidents, it basically guts any statute of limitations. What happens if you have a harassment case, the people continue to work together? It's done, it's over, the harassment is complete. These people continue to work together, they pass each other in the hall because they actually work in the same office, someone greets -- someone greets the person he or she allegedly harassed, does that make a continuing violation because the person who was the alleged victim is then uncomfortable? That can't be the case. There has to be something more compelling. And the "yo," basically saying hello, "why did you turn away," is just a greeting, and it's clearly distinct in kind from the allegations of the harassment, and the time period that has elapsed is far too extended to allow it to be a continuing violation.

As for the substantive claims in connection with the New York State and City Human Rights Laws, as your Honor knows, Ms. McKenna has made some --

THE COURT: I'm sorry, I didn't hear the last part.

MS. FOTI: -- Ms. McKenna has made very good arguments on this. I would just like to also add the fact that, again, Mr. Henry cannot be personally liable as a person in his position who he did not supervise. He did not supervise Ms. Eckhart. So, under those statutes, he wouldn't have direct liability.

And as to the aiding and abetting statute, I think we've, at length, discussed in our briefs the fact that he can't aid and abet his own liability. So to the extent there is no liability for Fox under these allegations — and I think there should not be liability for Fox under these allegations — he can't aid and abet the allegations that he engaged in some sort of harassment because those are about his own conduct.

THE COURT: Do you want to turn to the GMVA?

MS. FOTI: Yes.

THE COURT: One question I did have is whether you agree that the elements other than gender animus have been met. I know you're contesting gender animus, and we can talk about that or not, but are you conceding that the other elements have been met? Are you not? It's basically that the alleged act constitutes a misdemeanor or felony against the plaintiff; (2)

presenting a serious risk of physical injury; (3) that was perpetrated because of plaintiff's gender; (4) in part because of animus against plaintiff's gender; and (5) resulted in injury. Are you contesting 3 and 4 relating to gender, but conceding the others?

MS. FOTI: We're not conceding that there was any type of criminal conduct here.

THE COURT: No, but based on the allegations, assuming the allegations are true. I understand that factually you're, of course, denying the allegations, but --

MS. FOTI: Based on -- yes, if you take the allegations as true, we are contesting, really, only that the animus based on gender, that is not supported by the allegations in the complaint. Again, the Southern District has, I think, ruled on this before and determined that there has to actually be some allegation of gender animus. Without that, then all you have is an assault.

THE COURT: You don't think comments like, and I'm quoting now, "Gentle little whore, you're going to get tossed around like a little rag doll," or all of the other comments using the word whore and others have a gender-based component to them?

MS. FOTI: No, I don't think they do, your Honor. It's common -- unfortunately, it's common words in everyday speech. It could be consistent with the nature of the

relationship they were having, a consensual relationship, and the fact that those words were used does not suggest that the conduct was based on gender animus. You have similar words, unfortunately, that could be used against an individual who was -- if you raped a man rather than a woman allegedly, and you used those allegations -- I mean those statements.

THE COURT: All right. You may proceed. Thank you.

MS. FOTI: Your Honor, we have two other motions that I just want to talk about briefly -- I'm sorry, let me just turn -- I didn't address the issue about civil rights law and the allegations that somehow we violated the civil rights law by appending the pictures to our motion to dismiss. Again, Ms. McKenna has gone through sort of the requirements of that, but, certainly, there is an exception that allows those pictures to be put into legal proceedings. We filed it in connection with the legal proceeding. And specifically, in addressing a question you had yesterday, I think we are completely within our right to append those pictures because they were referenced in the complaint.

THE COURT: Why didn't you just refer to those pictures and describe them as opposed to attaching them, given their nature?

MS. FOTI: Given their nature? Well, we redacted the more intimate pieces of those pictures. Why did we not just refer to them? Because we are defending a man whose life has

been ruined. This man's career has been ruined. His position is that this was a consensual relationship. The pictures demonstrate that this is a consensual relationship. We were entitled to attach them to the complaint because the plaintiff referred to them. She specifically relied on them in drafting the complaint and making the allegations. She alleged he engaged in blackmail. None of that is true. And because she was referring to them, and she relied on them, we were entitled to defend our client as aggressively as we could within the bounds of the law and put the pictures into a motion to dismiss so that it was clear that these were consensual and they were provided to our client consensually. They do not have the same impact, your Honor, even on you by just describing them. Once you see them, you know that this was a relationship that Mr. Henry and Ms. Eckhart had that was consensual once you see those pictures. I don't think you'd have the same understanding if I just described them. I was doing what I was required to do to defend my client, and we were entitled to do so under the law.

Similarly, with the text messages, I have the case law that you requested, if you'd like me to refer to it, yesterday, when we talked about -- in the Areu matter about whether or not text messages, you could incorporate the portions that were left out.

THE COURT: Right.

MS. FOTI: I have a number of cases on that. One is *Lopez-Serrano v. Rockmore*. They're cited in our papers.

THE COURT: Okay. If they're cited in your papers, feel free to just write an email with the cites -- a letter, rather, and just file it on the docket with the cites, but we'll look back on your papers as well.

MS. FOTI: They are cited. Thank you, your Honor.

THE COURT: You can just move on for now.

MS. FOTI: So, again, those citations make it very clear that we are entitled to submit the entire text message for your consideration and that the Court can consider it on the motion to dismiss and should consider it on the motion to dismiss.

Finally, on the motion to strike, I believe you've already suggested on the issues about my conduct or supposed conspiracy with Proskauer, that that is not something you're giving serious consideration to, but I do think it should be struck from the complaint.

In addition, all the allegations about these other women that have nothing to do with harassment in the workplace, have nothing to do with Ms. Eckhart, I believe all those allegations should be struck. They don't support, again, the sex trafficking, they don't support any type of harassment --

THE COURT: Don't they go to knowledge, particularly Fox News' knowledge, of these other allegations?

MS. FOTI: First of all, I don't believe there's any allegation that Fox knew about those allegations, but whether or not they go to knowledge, I think it's irrelevant. The fact that Mr. Henry might have relationships outside of work is irrelevant to whether or not he is a harasser within the workplace. I don't believe that they go to knowledge, your Honor, so I strongly request that they all be struck, the Brooke Hammerling, Roxie Marroquin, and all the Jane Doe allegations.

Finally, we do have another motion for a more definite statement, and that is, in particular, in connection with the sex trafficking allegations. To the extent you believe those should be sustained, I think we are entitled to know when the text that the plaintiff relies on suggesting that there were certain text messages that enticed her, when those text messages actually were exchanged, because we have no reason to believe that they were exchanged actually before the alleged rape. If they're exchanged after the alleged rape, they cannot be used to support a claim of enticement.

THE COURT: Thank you very much.

MS. FOTI: Thank you very much.

THE COURT: Mr. Willemin.

MR. WILLEMIN: Thank you, your Honor.

THE COURT: I have a hard stop a little before 3:30. Keep it to maybe 20 minutes ideally.

MR. WILLEMIN: I'll go as speedy as possible.

THE COURT: Thank you.

Do you want to just start with that last point? Do you know the date of those texts?

MR. WILLEMIN: The way that we pled the complaint wasn't intended to trick anybody. My understanding, based on conversations with the client, is that those texts were sent in the order that we pled them, and sent in the order like we did a text and then we did an event, that that was the order that proceeded. Some of those texts, for various reasons, I don't think we have the exact date on, so that will be something that we can continue to inquire into in discovery, but I'm happy to answer an interrogatory, to the best of our ability, the dates of various texts, or I could try to redo this complaint to make it as more specific as possible. I'm not necessarily opposed to that. But we did our best to at least put it in chronological order, and it wasn't our intent to trick anybody.

THE COURT: So, in any event, you're amenable to providing that information?

MR. WILLEMIN: Yes.

THE COURT: So why don't we move on.

MR. WILLEMIN: Okay.

So I'd like to start with the discrimination claims against Fox News. So, Fox News indicates that it should be off the hook on these claims because of a lack of knowledge and

because of the statute of limitations issue. And I'd like to start with the purported lack of knowledge.

As your Honor knows, this is a motion to dismiss, and in seeking dismissal, the defendant is essentially saying, well, we're claiming we didn't know, and so you have to dismiss the case. And you can't get a case dismissed that way. Fox News cited literally no cases in their briefing — not in their moving brief or the reply brief — in which a pleading was dismissed based on a purported failure to allege knowledge. And, in this case, we've alleged many facts that could put Fox on notice that Mr. Henry could be engaging in this type of misconduct. As your Honor knows, this is nothing more than a negligence standard.

The facts are that -- and I understand the argument, and I won't get into it, whether his affair with the stripper is relevant or not relevant to the workplace, but what's relevant is that Fox News, after becoming aware of that, suspended him and required him to complete a sexual addiction rehab program.

THE COURT: So if he, in his personal life, has a sex addiction and had an affair, whether it was with a stripper or someone else, why does that necessarily translate into Fox being on notice that he was actually going to harass people or sexually traffic them?

MR. WILLEMIN: Well, so, in the first instance, given

that they required him to go through this process, they should have at least had a heightened awareness to pay attention to what was going on in the workplace and his interaction with women in the workplace. At that point, I think they had an obligation to take measures to ensure that nothing happened in the workplace. This is just the beginning, right? So, after this, Fox hires an outside law firm, and multiple women complain about sexually inappropriate conduct perpetrated by Mr. Henry. This is known to the VP of HR and the president of Fox News. Totally separately, a letter was sent to the VP of HR and the chief news executive, in which the letter wrote that women were crushed by the possibility of Henry's more prominent role, given promises to clean up the company after the departure of Ailes.

So, there's a clear -- two things here: One is that we don't allege that this has specifically to do with the incident relating to the stripper. In fact, given the fact that multiple women complained about sexually inappropriate conduct, it's a reasonable inference to assume that the letter could assert that as well. Obviously, we're going to get into that in discovery in this case, but there's also a direct correlation to the departure of Mr. Ailes. And we all know the nature of Mr. Ailes' departure was not because he had an affair with a stripper; it was because of what he did in the workplace to women at Fox News for many years.

And then, as your Honor pointed out during questioning of the defense counsel, there are multiple other women who have reported that Mr. Henry's reputation for sexually inappropriate conduct was, quote, well-known, and warnings about him were circulating as early as 2016. So, we have a more lengthy recitation of that article from which that information came in the complaint, but this is way more than enough, from a factual allegation perspective, to suggest that Fox should have known that Mr. Henry could engage in sexually inappropriate conduct in the workplace. They did know. People complained about it.

And this is in the context -- and I won't belabor the point, but this is in the context where there's a company that has a propensity to bury its head in the sand with respect to these types of things.

THE COURT: I just want to stop you. I'm looking at the transcript. I think you said twice that Fox should have known that Mr. Henry could engage. Is that the standard? Is the standard that you should have known that he could have, or is it that you should have known that he was or would?

MR. WILLEMIN: That's fair, your Honor. I think I'd have to look back at the precise language. I think the standard is that they should have known that he would engage in this type of behavior. But they did, in fact, know that he was engaged in sexually inappropriate behavior based on the complaints that were made, that were alleged, the letter that

came in, the fact that it was an open secret there that he was trying to entice and lure young women into sexual relationships. All of this is pled. It's enough to get this case to discovery.

When you look at the way in which they treated other men where similar types of allegations had been made — Roger Ailes, open secret, Bill Shine, open secret, Bill O'Reilly, open secret — and continuing to employ these people even knowing -- Bill O'Reilly, they gave him a $25 million deal contract after knowing he had settled at least six cases of sexual harassment. So the idea that they can just come into court and say we didn't know in the face of all these allegations and get the case dismissed right off the bat would really be a perversion of the pleading standard.

This is continuing. Literally, just yesterday, news broke of another settlement of a sexual harassment case by an individual at Fox News who's still there. So, that's with respect to the knowledge. I think we've pled well more than enough with respect to knowledge.

With respect to the continuing violations doctrine, I think --

THE COURT: I want to stop you there. So, under the state human rights law, an employer may be liable for an employee's discriminatory act if the employer became a party to it by encouraging, condoning, or approving it. Which one

happened here?

MR. WILLEMIN: Condoning it. I mean, we have multiple instances of complaints about Mr. Henry's conduct, with no appropriate remedial action taken. And, in fact, he continues to be -- I would say even approving it because he continues to be, over the years, given more responsibility and more prominent roles at the company.

THE COURT: How are they condoning it? It's one thing to say that they should have been on notice of it, right? But to say that they were condoning it suggests that they knew precisely what was happening and were encouraging it in some fashion, no?

MR. WILLEMIN: Well, I think even under the New York State Human Rights Law — and I know that this is the case under Title 7, although we're out of SOL on Title 7, but under the New York State Human Rights Law, I believe negligence is also essentially the standard under all three under Title 7. So I'm not sure that you have to sort of affirmatively -- let me put it this way, if that were the case, then under the New York State Human Rights Law, actual knowledge would be required. And I'm certain that actual knowledge is not required.

THE COURT: We'll look at that.

Even if the continuing doctrine applies — I know you were about to touch on that — but why isn't your Title 7 claim still untimely?

MR. WILLEMIN: The Title 7 claim is not -- it's not untimely with respect to the retaliation, but it is untimely with respect to the sexual harassment and the hostile work environment.

THE COURT: Thanks.

MR. WILLEMIN: So, as your Honor noted during questioning earlier, especially the "Why did you turn away today" and, also, the Heisman pose message, these are very reminiscent of the previous hard-to-get messages, which were both sent to Ms. Eckhart, both in 2014 or '15 and also in 2017, and preceded nonconsensual sexual acts. This is his way of getting in, because he, in both of those earlier instances, by saying that she was hard to get, is essentially saying that -- she is now feeling I got to appease this guy because he's going to be mad at me. This is his way of using his power to get her to engage in sexual activity, this is his MO, and this is exactly what he was trying to do again.

And with respect to the temporal distance, that is a complete nonissue. I know Ms. McKenna brought it up a lot, but there's no cases that suggest that. And your Honor was correct, actually, it is the *Morgan* case, the U.S. Supreme Court case, and the hypothetical in that case was that there was a 301-day gap between acts, and the Court said that that gap would not destroy the continuing violations doctrine.

THE COURT: Just putting aside the timing issue for a

minute, I want to talk about supervisory liability. So the court in *Hughes* said for both claims under the state and city human rights law, the defendant must be the plaintiff's supervisor to be liable. Do you think *Hughes* was wrong? I mean, I know you briefed this a little bit, but how was he her supervisor when they're in different cities, on different shows?

MR. WILLEMIN: Well, I would just say, with respect to the first question, *Hughes* was wrong, and that's actually been recognized by your Honor in the *Spires v. MetLife Group, Inc.* decision. An individual is directly liable for discrimination regardless of whether he's a supervisor under the city human rights law. That's also been held by Judge Carter, Judge Engelmayer, Judge Failla, Judge Batts, Judge Ramos, and many, many others in the district.

With respect to the supervisory --

THE COURT: I meant with respect to Fox.

MR. WILLEMIN: I'm sorry?

THE COURT: I was focusing specifically on Fox.

MR. WILLEMIN: Oh, whether or not there's a separate angle for liability?

THE COURT: Yes. For Fox to be liable for Henry's conduct, does Henry not have to have been Eckhart's supervisor?

MR. WILLEMIN: Only if Fox didn't know or should have known. So it's neither or. So, if you can establish that Fox

should have known that the conduct was occurring, then that is sufficient to give liability under a coworker circumstance. So that's the theory upon which we're primarily going.

I do think, frankly, given the Supreme Court's decision — I believe it is in *Vance*— where the Supreme Court held sort of better defines what a supervisor is in this context left some gray area open for people who have apparent authority to do things, and if Fox is letting its hosts run around promising people to get them on shows and meet their agents and advance their careers, et cetera, even if there's not a direct reporting line relationship, I'm not so sure that wouldn't still constitute a claim, but that's not the primary theory --

THE COURT: Was he host at the time of the allegations regarding the comments he made in question?

MR. WILLEMIN: At that point, I believe -- I believe, at that point, he had not been starting to host, but that was the promise, essentially, was that he was getting his own show and that he would then be able to put her on that show. So that was the context there.

I don't know if you have any further questions on the continuing violations doctrine, but the only other thing I'd say is that the cases like *McGullam*, which Ms. McKenna cited, that would involve separate harassment -- harassment by separate people in separate departments, like nothing to do one

with the other, and the same with *Annunziata*, it was perpetrated by a completely different person where they were trying to connect the continuing violations. That's not analogous to what we have here.

With respect to retaliation, as your Honor knows, there are -- when we're talking about the meeting in February with Denise Collins and Brad Hirst, there are no magic words that need to be used. In this case, we have an organization in Fox News that had just gone through four years of continued, continued, continued sexual harassment allegations, and our client says that she was subjected to a toxic work environment. Not only do they not ask her any follow-up questions at all, one of them looks to the other and says do you think the work environment is toxic? The person says no. And then that was the end of that. And then Mr. Hirst says you're going to face repercussions if you pursue the complaint.

In the context of Fox News, it certainly could reasonably be understood -- and that's the standard, by the way, reasonably understood to have been a complaint of protected activity, one of discrimination. So we do assert that that was a protected activity in February, after which our client was terminated despite her outstanding performance, according to all of the emails and documents we cite in the complaint.

They can't just -- on the exit interview question, we

didn't plead that that's Fox's modus operandi, to ask every single person leaving the organization whether they've been sexually harassed or assaulted. So, Ms. McKenna can say that, but that's not what we pled, so that is a consideration that shouldn't be taken into account.

THE COURT: But when you talk about a toxic work environment and the fact that she mentioned that, the beginning of the complaint all deals with problems that she had at Fox that had nothing to do with sexual harassment or any gender-based misconduct, right? And so why should I read into that toxic environment an allegation that she was essentially alleging protected activity?

MR. WILLEMIN: Well, I think --

THE COURT: Or discrimination, gender-based discrimination.

MR. WILLEMIN: First of all, we also don't allege that she was complaining about this claim, so that allegation, it could be an inference that could be drawn, but I don't think it's the one that would be drawn in favor of the plaintiff, of course. But I think, again, it's in the context of what did Fox understand her to be doing, and I think given the surrounding, as I just described, that Fox would have understood that she could at least, could at least, have been raising a concern about discrimination, sexual harassment, and, at that point, it had an obligation not to just make light of

it and tell her that she faced repercussions if she pursued it.

So, that's, I think, the best way I can answer your question.

THE COURT: Can we turn briefly to sex trafficking?

MR. WILLEMIN: Yes.

THE COURT: I cut you off. Did you want to say one more thing?

MR. WILLEMIN: No. No, there are other acts of retaliation we can get to if we get to them.

THE COURT: Okay. With sex trafficking, I guess the main thing I want you to respond to is the argument that in reading the sex trafficking statute the way that you're proposing, it would apply to so many different scenarios in which someone promised to help someone and engage in sexual activity with them, promised to help them in their life in one way or another and engage in sexual activity. Obviously, there are other elements, like the interstate component, but do you want to respond to that kind of general critique?

MR. WILLEMIN: I would say one thing.

The first thing is that's really not what happened here. I mean, he made promises to her which were fraudulent, and I think, almost essentially admittedly, because he says he -- he says he can't actually go through on them, but then he violently attacked her. This is not like they went to the hotel, and, you know, they had what's seemingly completely

consensual sex; this is a Weinstein act, but worse. First, he forces her to give him oral sex by physically pushing her head down and physically pushing his penis into her mouth, and then, the second time, he gets into a hotel room and handcuffs her, throws her on the bed, hits her in the face, leaves all her bloodied and battered and bruised. Even if you buy this concept of this slippery slope argument, this is not the slippery slope case.

And, secondly, I don't think that the elements would permit that because you still need to establish fraud or force. And so if I make a promise to you -- frankly, I mean, if I make a promise to you, and there's interstate commerce and other elements of that to some sort of benefit, like a movie role or meeting my agent or getting on my show, and because of that, you end up sleeping with me, and I procured that through fraud, that is what the statute requires. And it's supposed to be something that's a broadly interpreted statute, as your Honor did notice in the *David* case.

And I believe your Honor also noted in the *David* case that empty promises of career advancement are of the sort of enticement that could give rise to liability once you have those other elements in place. And the actual word "enticement" in this case, in the statute, I believe, your Honor -- I'm not sure if your Honor was quoting the statute or the dictionary definition, but, in that case, it was to attract

by arousing hope or desire. So that's the statute. But, in this case, it's not that, this is not that borderline case. The guy clearly used his influence to suggest he'd get her meetings with agents and powerful people and get her on his show, all of which she viewed -- and this is in the context of that first meeting, by the way, before the first encounter, which she never said it was consensual in the first complaint. That meeting was for the purposes of discussing her career advancement.

So from the very start, this relationship was one in which he had a coercive ability over her, she's looking for him for career advice, he's making various promises to her. And then with respect to just moving on to the knowledge issue, first of all, you don't get a free pass to, like, rape someone and put them in handcuffs and beat them up because they happened to have sex with you before. That's unbelievably offensive.

But, secondly, of course, he knew he was going to have to use force the third time because he used force the second time. He forcefully used his hands to push her head to physically force her to give him oral sex, so the idea that he wasn't expecting to have to use force the second time -- or the third time, rather, is kind of preposterous, and, in any event, he used fraud to get her into that hotel room. And he harbored, that's another one of the ways in which you can

violate the act, because he literally handcuffed her in the room.

Again, these cases are very similar to the Weinstein cases, to the *David* case, to the *Geiss* case, although I think that came out wrong in one other area I'll get to in a minute.

But this is not -- this would not be a unique application of the TVPA by any way, shape, or form. As your Honor, I think, noted, and similar to some of the promises that were given to people in the Weinstein cases, these are real benefits, these are real, material, valuable benefits, and to suggest otherwise, especially in an industry like this where connections are everything, and you are talking about TV? That's a real benefit.

With respect to Fox's arguments, I mean, this is -- again, I think your Honor hit the nail on the head on some of this stuff, a should have known situation based on all the allegations of the complaint — I won't repeat them — but I'm trying to see what other -- oh. So, an issue -- I think *Canosa* gets it right on the issue of whether or not there needs to be a benefit to the enterprise as a result of the sex trafficking or versus whether it just needs to be a benefit of essentially that person's continued being around. And I think *Canosa* gets it right: By facilitating and covering up Weinstein's sexual assaults, TWC made Weinstein more likely to continue to work for TWC. While the facts developed at discovery may or may not

substantiate this allegation, the AC adequately pleads a symbiotic relationship between the companies and Weinstein, in which the companies affirmatively enabled to conceal his predations as a means of keeping him happy, productive, and employable, and then the company reaped benefits.

So that's the theory of the case in this case. I think *Geiss* got it wrong because, as we explained in our briefing, it relied erroneously on the Sixth Circuit decision that turned on the criminal provision of this.

And then in *David*, that, I think, is distinguishable pretty significantly because, in that case, the ruling was based on a lack of a duty that Robert Weinstein owed to the plaintiff. He had never met her, he didn't even know who she was. There is obviously --

THE COURT: I'm obviously familiar with that case.

MR. WILLEMIN: Understood.

THE COURT: I do have other questions about other matters, if you don't mind my just moving along.

One on unlawful dissemination: Do you have any case law to support your argument that the submission of the photographs was not lawful or common? Where is that language coming from?

MR. WILLEMIN: Well, the actual language of the statute only provides an exception for the lawful and common dissemination in connection with the lawsuit. There's no case

law, that I'm aware of, that defines that, but common, in this case? I haven't been practicing forever, but I've been practicing for ten years, I've never seen a defendant do anything like this before, putting these types of pictures in a public docket. There were so many other ways they could have gone about it. They could have reached out to us first to see how we wanted to handle it. They didn't even agree to have them sealed after we made the request to the Court. And, as your Honor noted, they shouldn't have been filed in the first place because they're extrinsic evidence, and we did not reference those photographs in the complaint — that is completely false. The photographs we referenced in the complaint were photographs that Mr. Henry took of our client when she was in handcuffs on the bed as he was about to rape her, not photographs that now they're putting on the public docket. This is a completely unusual maneuver, and the worst part about all of it, in my view, other than, of course, the shame that this causes my client, is that the legal arguments don't even rely on these photographs. They were done completely gratuitously. They're not even arguing that we pled a consensual sex case or that the case needs to be dismissed because these photographs exist.

So, there was no legal basis whatsoever to even attach the photographs to them to begin with, so how you could argue that that is a common legal practice, to me, is just beyond --

I just don't understand.

THE COURT: When I was asking that, I didn't mean to ask where the language came from, I meant to ask, which you've already answered, sort of how your interpretation of why this was not lawful and common, where that came from and what you're relying on.

Do you want to respond to the argument with respect to the redaction of the photos?

MR. WILLEMIN: Well, there's a number of photographs where you can see area around the pubic area, so the intimate parts. Like all the photographs where -- they're not all hers, but there are various photographs where she's wearing a thong, and you can see around the pubic area. And also the fact that you redact something doesn't mean that she's now not naked. It's still a picture of her naked. You've redacted it to a degree, but it's still a photograph of her unclothed, which is what the law prohibits you from doing.

THE COURT: One other issue I wanted to ask you about, and then you can just be heard on whatever else you'd like to be heard on, is on the GMVA, and if you can respond to the arguments with respect to whether this was specifically gender based, what the evidence of that is or has been alleged, and then whether extrinsic evidence of animus beyond the rape itself is required.

MR. WILLEMIN: So, as to the second question, the

answer is no, that, in my view, this Court should look to the decision in *Breest v. Haggis*. This is a state law -- I'm sorry, this is a city law, but this is a state court, the Appellate Division, First Department, it is the highest court in the state that has decided this issue, and has decided, very clearly, that rape and sexual assault are, by definition, demonstrative of malice or ill will based on gender. I think that that case got it right.

Even before that case, there was a split between various cases in the district, and I think it's, to me anyway, and perhaps people will disagree, pretty obvious that if you're raping a woman, the fact that she is a woman has something to do with it, unless he's saying I rape men, I rape women, I rape nonbinary people, and I think that this clearly is motivated in part by the fact that this is a woman.

Now, the animus piece of it, again, the *Breest* case, I think, puts to bed that inquiry, but the messages that he sent here are clearly demonstrative of his view of women. He said she's going to be owned and submissive. I mean, he didn't -- he didn't, by the way, just rape her, which is crazy for me to even be saying that, he hit her, he handcuffed her, he bruised her up. I mean, the idea that he was calling -- as your Honor noted, he's calling her a whore, he's saying she doesn't have a choice. So, I mean, all of this language, and also, the acts -- and I'm not -- you don't need to have -- either for the

TVPA or the GMVA, you don't need to have a modus operandi, that's just not the law. You can prove certain elements with modus operandi, but you don't need to have one, though. But, in this case, I'm not suggesting a modus operandi of violent rape, but the way in which he treated the other women whose allegations are contained in the complaint, many of whom are Fox employees, further demonstrates his misogynistic viewpoint and his disregard for the rights and liberties of women.

THE COURT: Thank you.

MR. WILLEMIN: If you don't mind, can I ask the time again?

THE COURT: Yes. It's 3:24. But I know I gave defendants more time, so if you want to make some final points, just do so quickly.

MR. WILLEMIN: No. What I really want to do, actually, is at least speak for two minutes on the sanctions issue. So I'd like to have the opportunity --

THE COURT: Make it one.

MR. WILLEMIN: Okay. Just two things:

The briefs say what the briefs say. I understand zealous advocacy, and I understand that that's part of the game here. I am accused in those briefs of extortion three times. I have never been accused of extortion in my life. Ms. McKenna and the Proskauer firm know, and Fox know, that we did not extort them. If I extorted them, I'd be reported to the

disciplinary committee, I would be reported probably to federal prosecutors, and if I extorted anyone, I'd probably be in jail right now.

The second point I want to make -- so I feel like that's an unbecoming accusation.

The second point I want to make is that yesterday, Ms. McKenna stated that we passed the hot potato of Kathy Areu over to the new firm. That's factually inaccurate, which she knows, but, even more so, I think it's really inappropriate to be referring to litigants in open court as a hot potato.

So, I don't believe sanctions are warranted for the reasons in the briefing, but I did feel very much compelled to note that everyone knows there was no extortion here.

THE COURT: All right. Thank you.

If you each want one minute to respond?

MS. McKENNA: Two quick things, your Honor:

First, the hot potato was certainly not a reference to Ms. Areu, not the first time I used it, nor the second time, but a reference to the situation created by the Wigdor firm that they tried to pass off.

Second, with respect to the allegations -- the argument Mr. Willemin made that Fox News, on its motion to dismiss with respect to the harassment claim and the imputation of knowledge, that we are just claiming we didn't know, that distorts Fox News' argument. What we argued is that the

complaint, Ms. Eckhart's complaint, does not allege a single incident of anyone telling Fox News about alleged work-related harassment committed by Mr. Henry prior to February of 2017. The only thing they allege is, with respect to the Paul Weiss letter, of allegedly sexually inappropriate conduct, not sufficient for *Iqbal* and *Twombly*. It doesn't say whether they were employees, it doesn't describe whether it's work-related conduct, it doesn't say when the report was made, it doesn't say when or if that information was communicated. That is the only allegation to try and allege that Fox News should have been on notice of Mr. Henry's work-related behavior, and it fails. It is undisputed that when Fox News learned of his alleged conduct towards Ms. Eckhart, it investigated, and it fired him.

THE COURT: All right. Thank you.

Any final thoughts, Ms. Foti?

MS. FOTI: Yes.

Specifically as to the images, they're redacted, so the redaction makes it not fall within the statute. That's number one.

They are absolutely relevant to whether or not the enticement element was met in terms of the sex trafficking, so they're relevant to that.

The fact that the rape was violent, as alleged, does not turn it into a sex trafficking violation, no matter how --

whatever the allegation is in terms of what happened. What the allegation needs to be is somehow she was enticed by fraud, and we are not saying that the representation that Mr. Henry said he may be getting his very own show was a fraud. There's no allegation that -- there's no proof that that would have been a fraud. He may have said that. Whether or not he got it only shows that it was not material. That's the issue.

And just one more thing: In terms of the continuing violation, *Williams v. New York City* specifically says that none of the statements come close to actual conduct. But, basically, what that case is saying is that the conduct itself which is being alleged to be the continuing violation, so, "Yo, the Heisman trophy," that in and itself has to be actionable. It can't be a petty slight. You can't continue the alleged harassment using a petty slight years in advance. So, those actions, in and of themselves, cannot extend the statute of limitations.

THE COURT: All right. Okay.

Thank you, all. It was very well argued on all sides. I will reserve decision.

MR. WILLEMIN: Thank you, Judge.

MS. McKENNA: Thank you, your Honor.

MS. FOTI: Thank you, your Honor.

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